1962

Edwin F. Russell v. Grant L. Valentine : Brief of Respondent

Utah Supreme Court

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Case No. 9648

In the Supreme Court of the State of Utah

EDWIN F. RUSSELL,

Plaintiff and Respondent,

vs.

GRANT L. VALENTINE,

Defendant and Appellant.

RESPONDENT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY. HONORABLE CHARLES G. COWLEY, DISTRICT JUDGE.

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STATEMENT OF THE KIND OF CASE

This is an action under the Declaratory Judgment Act by the Lessor, plaintiff, against the defendant, as an

Assignee of a lease to interpret the terms of the lease and to determine if the lease is terminated.

DISPOSITION IN THE LOWER COURT

The case was tried in the District Court of Weber County, Utah, before the Honorable Charles G. Cowley, sitting without a jury. Judgment was rendered in favor of the plaintiff.

STATEMENT OF FACTS

The plaintiff, Edwin F. Russell is now, and was in the year 1950, the owner of a tract of land situate in Roy, Weber County, Utah. On the 29th day of May, 1950, Edwin F. Russell, as Lessor, entered into a written lease agreement with Self-Service Enterprises, Inc. of Salt Lake City, Utah, as Lessee, by which he leased said land for a term of ten years, beginning on the 1st day of June, 1950 (Exhibit 1).

Self-Service Enterprises, Inc., as Lessee, agreed to pay $100.00 a month, in advance, on the first day of each and every month, beginning the 1st of June, 1950, as rental therefor.

The lease agreement contained a paragraph which is paragraph 8 thereof, as follows:

> "8. If the Lessee shall keep, observe and perform all of the terms and conditions of this lease, on his part to be kept and performed, said Lessee shall have the right to renew this lease for a further period, beginning as of the termination date of this lease, provided he shall notify the Lessor in writing thirty days prior to the terms of this agreement that he desires such renewal and pro-

vided, further, that he shall sign or offer to sign a new lease upon the same terms and conditions as are herein contained."

The defendant, Grant L. Valentine, is the assignee of the lease, through successive assignments of said lease, and has been in possession of the property described in the lease from the 30th day of October, 1954 (Exhibit 4).

The defendant, Grant L. Valentine, attempted to renew the lease for a further period of ten years by giving the lessor written notice of his desire to renew such lease, thirty days prior to the expiration date of May 31, 1960 (Exhibit 8).

The plaintiff filed this action under the Declaratory Judgment Act, asking the Court to interpret said lease and contending that the portion of Paragraph 8, which refers to renewal, is vague, ambiguous, indefinite and uncertain, and requesting the Court to enter judgment that the lease was only for a ten year period and terminated on the 31st of May, 1960. (R. 2 and 3).

The draft of the lease was prepared by Duane E. Fuller, Secretary of Self-Service Enterprises, Inc., and the final drawing of the same was made by Mr. C. N. Ottosen, who was the attorney for Self-Service Enterprises, Inc. (T.5). Duane E. Fuller, the Secretary and Treasurer of Self-Service Enterprises, Inc. and Helmut Moss, the President of the Self-Service Enterprises, Inc. negotiated with the plaintiff, Edwin F. Russell, for the lease (T.5). The negotiations extended over a period of two or three weeks (T.6). The trial Julge found that the provisions of Paragraph 8 referring to renewal were

ambiguous, indefinite and uncertain and incapable of enforcement, and that any extension, or renewal, beyond May 31, 1960, would require negotiation and execution of a new lease agreement between the parties (R.22). The Court further found that the lease was for a period of ten years and terminated on May 31, 1960. (R.22).

STATEMENT OF POINTS

POINT I

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE PROVISIONS OF PARAGRAPH 8 OF THE LEASE, DEFENDANT'S EXHIBIT I, REFERRING TO RENEWAL THEREOF, WERE AMBIGUOUS, INDEFINITE AND UNCERTAIN AND INCAPABLE OF ENFORCEMENT.

POINT II

THE COURT DID NOT ERR IN ADMITTING PAROL TESTIMONY TO EXPLAIN OR INTERPRET THE TERMS OF THE WRITTEN LEASE.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE PROVISIONS OF PARAGRAPH 8 OF THE LEASE, DEFENDANT'S EXHIBIT I, REFERRING TO RENEWAL THEREOF, WERE AMBIGUOUS, INDEFINITE AND UNCERTAIN AND INCAPABLE OF ENFORCEMENT.

Respondent contends that the provision set forth in the lease concerning the right of the Appellant to renew the lease is ambiguous. The portion of the lease which required interpretation by the trial court is paragraph 8, which provides as follows:

> "8. If the Lessee shall keep, observe and perform all of the terms and conditions of this lease, on his part to be kept and performed, said Lessee shall have the right to renew this lease for a further period beginning as of the termination date of this lease, provided he shall notify the Lessor in writing thirty days prior to the terms of this agreement that he desires such renewal and provided, further, that he shall sign or offer to sign a new lease upon the same terms and conditions as are herein contained."

In determining whether this paragraph is ambiguous, the trial court was required to interpret the wording contained therein in relation to the right of renewal. The language used is as follows:

> ". . . said Lessee shall have the right to renew this lease for a further period beginning as of the termination date of this lease . . ."

The Respondent contends that this clause is ambiguous in that it does not set forth the particular period for which a renewal would be granted. The fact that the paragraph also contains a provision that the Lessee shall notify the Lessor, in writing, thirty days prior to the terms of the agreement that he desires a renewal, and that he is willing to sign a new lease upon the same terms and conditions, as therein contained, does not fix the period for which the renewal is to be. The Respondent contends that reference which is made to the same terms and conditions apply to all other terms and conditions of the lease, except the period of time of the original lease. If it were the intent of the parties to the agreement to grant a renewal for the same period of time which was referred to in the original term, it could have

been simply stated in the paragraph providing for such renewal. The crux of this whole law suit rests upon the words "for a further period".

If Paragraph 8 had provided that the Lessee shall have the right to renew this lease upon the same terms and conditions, and the words "for a further period" were not in the paragraph, this matter would not have been litigated as it would have been clear that the intention of the parties was to renew it for an additional ten year period.

The court after hearing the evidence offered at the trial, concluded that this paragraph was ambiguous and made a finding to such fact as follows:

> "8. The court further finds that the provisions in Paragraph 8 of the Lease referring to renewal thereof, are ambiguous, indefinite and uncertain, and incapable of enforcement, and that any extension, or renewal, beyond May 30, 1960, would require negotiation and execution of a new lease agreement by the parties." (R.22)

Respondent asserts that such finding of the Court is amply supported in the law and by the evidence presented at the trial of this action.

In the case of *Realty Corp. vs. Park Central Valet,* 297 NYS 40, it was held:

> "That a clause in a lease for a term March 1, 1933, to September 30, 1936, which provided for a renewal for 'an additional term of ..... years' was too indefinite and uncertain to constitute a renewal, on the ground that the parties apparently intended that where the clauses in the printed

> form of the lease contained blanks, such clauses were to be disregarded. The Court said that literally there could be no renewal for a period of "years", it would eliminate seven months of the original term of three years and seven months."

The Court held in *Metcalf Auto Co. vs. Norton,* 119 Me. 103, 109 Atl. 384, that the renewal clause of a lease gave the Lessee the privilege to re-lease at the end of the term for a term of years to be agreed upon at an agreed rental, and states:

> ". . . that a contract to make or renew a lease is of no legal effect if the premises to be leased, or the term or rental, are to be determined by a subsequent agreement of the parties."

In *Howard vs. Tomicich,* 81 Miss. 703, 33 So. 493, the Court held:

> "That a provision 'with privilege of longer' in a lease of premises for one year, is too vague and uncertain to constitute a binding covenant for a renewal, as there is no certain meaning in regard to the term or the consideration for the renewal lease."

The Court must determine the intention of the parties to a lease where an indefinite phrase is used, such as that which appears in the lease in the instant case. The general rule is set forth in 17 C.J.S. 689, and is stated as follows:

> "The primary rule of construction is that the Court must, if possible, ascertain and give effect to the mutual intention of the parties, as of the time the contract was made, so far as that may be done without contravention of legal prin-

ciples, statutes, or public policy."

17 C.J.S. at 695 continues:

> "As a general rule the language of a contract, in the case of ambiguity, should be interpreted in the sense that the promisor knew, or had reason to know, that the promisee understood it . . .. A party to a contract generally will be held to that understanding which he knew was in accordance with the understanding of the other party . . ."

In the case of Assignment of Rich Hardware Co., 196 P. 454,456; 22 Ariz. 254, the rule is stated as follows:

> "In other words, whatever is expected by one party to a contract and known to be so expected by the other, is to be deemed a part or condition of the contract."

The certainty that is required not to have ambiguity in a contract is set forth in 32 Am. Jur. at page 806, as follows:

> "Like other contracts or agreements for a lease, the provision for a renewal must be certain in order to render it binding and enforceable. Indefiniteness, vagueness, and uncertainty in the terms of such provision will render it void unless the parties, by their subsequent conduct or acts supplement the covenant and thus remove an alleged uncertainty. The certainty that is required is such as will enable a Court to determine what has been agreed upon . . . ."

A contract is construed strictly against the one drawing it. The uncontradicted evidence before the Court is that the lease was drafted by the original Lessee, Self-Service Enterprises, Inc., through Duane E. Fuller, the

Secretary of Self-Service Enterprises, Inc. Fuller was served with a subpoena in this action by the plaintiff. He testified that he had drafted the terms of this lease prior to the final drawing of the same by Mr. C. N. Ottosen, the Attorney for the Self-Service Enterprises, Inc. (Tr. 5).

In the case of *Mifflin vs. Shiki,* 77 Utah 190; 293 P. page 1; it was held that a strict construction must be placed upon a contract against the one drawing it. Likewise in the following cases the same rule was stated:

> *Smith vs. Burton,* 4 Utah 2d 61; 286 P.2d 806
> *Read vs. Forced Underfiring Corp.,* 82 Utah 529; 26 P 2d 325
>
> *Penn Star Mining Co. vs. Lyman,* 64 Utah 343; 231 P. 107
>
> *Wackerele vs. Martindale* (Idaho) 353 P. 2nd 782

In the case of *Hawaiian Equipment Co. vs. Eimco Corp.* 115 Utah 590; 207 P 2nd 794 at 800, this Court held:

> ". . . where the language (of a contract) used is susceptible to more than one interpretation, it will be construed most strongly against the person using it."

In the case of *Continental Bank & Trust Company vs. Bybee,* 6 Utah 2d 98, 306 P 2d 773, which is cited by the Appellant, Judge McDonough speaking for the Court said that Bybee was both the Attorney and the party in the action, who drafted the instrument and, therefore, that such instrument must be construed strictly against him.

The reason for the rule is expressed in 17 C.J.S., Contracts, Section 324, page 751, as follows:

> ". . . a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing more to his advantage."

The citation in 17 C.J.S. 751, further states:

> "To the extent that a contract is susceptible of two constructions by reason of doubt or uncertainty as to the meaning of ambiguous language, it is to be construed most strongly or strictly against the party by whom, or in whose behalf, the contract was prepared or the ambiguous language was used, and liberally and most strongly in favor of the party who is not the author, and not responsible for the use, of the language giving rise to the doubt or uncertainty."

The appellant argues that where there is uncertainty in a lease relating to a renewal, that the tenant is favored and not the landlord and cites some law to sustain this. However, it appears from the above authorities that this general rule has been tempered by the holdings of this Court, and Respondent contends that the rule that a contract is construed strictly against the one drawing it, far out-weighs any favorable interpretation that might be made in behalf of the tenant under such circumstances.

At page 7 of Appellant's Brief references is made to a general statement of the law concerning the word "renew" as stated in 32 Am. Jur. Respondent has no

quarrel with this statement. If, as hereinbefore stated, the Lessee was granted the right to renew the lease, Respondent would concede that it would be upon the same terms and conditions there being no other qualifying words as used in the present lease such as "for a further period".

Such ruling was made in the case cited by the Appellant in *Yoman vs. Levine,* 206 P. 2d 596, likewise the Respondent has no quarrel with the statement cited by the Appellant in C.J.S. Landlord and Tenant Section 71, at Page 619.

Respondent does dispute the statement, however, made by the Appellant that in the present case, the renewal paragraph contains a general covenant to renew.

Appellant argues that Mr. Russell, the Lessor, knew the language of the lease and read it before signing, and that if he were not satisfied with it, he was in a position to change or refuse to sign it. It must be remembered that Mr. Russell is not a lawyer; that he had negotiated with Fuller, who was experienced in drawing leases (Tr. 11), concerning this lease; and he was relying upon what had been said by Fuller to him; and the discussions that they both had concerning the proposed lease prior to the signing of the same.

In the case of *Starr vs. Holck,* (Mich.) 28 N.W. 2d 289, cited by the Appellant, it appears that the Court made its decision granting a renewal for a period of one year upon the theory that the lease should be construed favorably to the tenant. The rule of law that a strict construction must be given to an instrument against one

who drafted it was not raised in this case.

In the case of *Metcalf Auto Company vs. Norton,* 119 Me. 103, 109 Atl. 384, it appears to the Respondent that the Court went a long way in determining that the Lessee was entitled to have an extension of two years on the lease. The same is true of the case of *Miller vs. Clemons,* 276 S.W. 2nd 650, 651 (Ky.).

In the case of *Cummings vs. Rytting,* 116 Utah 1, 207 P. 2d 804, where the term of the lease is for five years with a five year option, Respondent agrees with the ruling in this case and has no argument against it.

POINT II

THE COURT DID NOT ERR IN ADMITTING PAROL TESTIMONY TO EXPLAIN OR INTERPRET THE TERMS OF THE WRITTEN LEASE.

The trial court having determined that an ambiguity existed in the lease, it was then faced with the necessity of determining the intention of the parties to the original lease because of such ambiguity as used in Paragraph 8 of the lease. It was, therefore, necessary that parol evidence be received by the Court to ascertain, if possible, the intention of the parties.

The rule for the acceptance of parol evidence of a written document is set forth in *Penn Star Mining Company vs. Lyman, et al.,* 64 Utah, 343; 231 P. 107 at 109 and 110:

> "No doubt the rule is universal and inflexible that extrinsic evidence may not be admitted, if its purpose or effect be to vary or to add to, or to modify in any material respect, the terms

of a written instrument. Upon the other hand, the rule is just as extensive and as well established that, in case the language of a written instrument is obscure, uncertain, or ambiguous, so that the intention of the parties is left in doubt by an inspection of the instrument alone, extrinsic evidence, within well-recognized limits, is always admissible to aid the court in arriving at the true intention of the parties. After all, it is the intention of the parties that constitutes their contract, and it is such intention that the courts aim to enforce. Moreover, unless the provisions of a contract are clearly independent, distinct, and severable, all of the terms and provisions must be considered and construed together, in order to arrive at the intention of the parties. In other words, the contract must be considered and construed as a whole, and such is the case, 'even if the separate parts are clear and free from ambiguity.' 2 Page, Contracts, Section 2038.

The general rule applicable to contracts, the language of which, is ambiguous or uncertain, is so clearly and comprehensively stated in *Salt Lake City vs. Smith* 104 F. at page 462, 43 C.C.A. 642, that we take the liberty of reproducing the statement in full:

> "'The purpose of a written contract is to evidence the terms on which the minds of the parties to it met when they made it, and the ascertainment of those terms, and the sense in which the parties to the agreement used them when they agreed to them is the great desideratum and the true end of all contractual interpretation. The express terms of an agreement may not be abrogated, nullified, or modified by parol testimony; but, when their construction

or extent is in question, the meaning of the terms upon which the minds of the parties met when they settled them, and their intention in using them, must be ascertained, they must prevail in the interpretation of the agreement, however broad or narrow the words in which they are expressed. In the discovery of this meaning, the intention, the situation of the parties, the facts and circumstances which surrounded and necessarily influenced them when they made their contract, the reasonableness of the respective claims under it, and, above all, the subject-matter of the agreement and the purpose of its execution, are always conducive to, and often as essential and controlling in, the true interpretation of the contract as the mere words of its various stipulations. These are rules for the construction of contracts which commend themselves to reason and are established by repeated decisions of the courts, and they must not be permitted to escape attention in the consideration of the contract which this case presents. *Accumulator Co. vs. Dubuque St. Ry. Co.,* 64 F. 70, 74, 12 C.C.A. 37, 41, 42, 27 U. S. App. 364, 372.'"

In the case of *Salt Lake City vs. Smith,* 104 Fed. Page 462, which was referred to in the decision of the Supreme Court in the case of *Penn Star Mining Co. vs. Lyman,* it was held:

"The fundamental inquiry in construing all contracts is a discovery of the intention of the parties. When this cannot be done with certainty from the terms of the instrument — that is in case the meaning of the terms is doubtful, debatable, or ambiguous — the true intention must

be ascertained by reference to the facts and circumstances preceding and accompanying the execution of the instrument.

"The purpose to be subserved by this rule is to place the court, or the jury, in the position of the parties at the time the contract was made, so that the language used may be interpreted intelligently.

Hence, proof of facts which tend to illustrate or explain the language used in the contract and to place the court or jury as nearly as may be in the situation of the parties at the time of contracting, is always admissible when the meaning of the terms used is debatable."

This decision is supported by citations in 33 ALR 2d 979,980. The rationale of these decisions is spelled out in 33 ALR 2d, at page 983, as follows:

"The reason for admitting parol evidence for the purpose of explaining ambiguities is very obvious. There is a great deal of difference between the admissibility of extrinsic evidence to explain that which is written. In the former case, the attempt is to clarify without denying. Parties, through inadvertence or lack of trial or skill, or merely by reason of the frailties of language, may express their intention vaguely. In such instances it would be a harsh rule were the court to adopt and enforce that particular one of several possible interpretations which to the judicial mind, and with entire disregard for the situation of the parties, was indicated by the language chosen. Of course, where a party seeks to deny the plain import of a writing which reveals no uncertainty in meaning, even when viewed in connection with the circumstances of its making, the rule of sub-

stantive law by which prior extrinsic matters are merged in the writing prevents him from succeeding. But where he seeks merely to explain that which is imperfectly expressed, the rule of merger is not violated."

Further support to the rule that parole evidence was necessary in this action is found in 48 ALR 2d at 1268, and is expressed in these words:

> "Whenever the terms of a contract are susceptible of more than one interpretation, or an ambiguity arises, or the extent and object of the contract cannot be ascertained from the language employed, parol evidence may be introduced to show what was in the minds of the parties at the time of making the contract and to determine the object on which it was designed to operate."

Likewise this rule is stated in 20 Am. Jur. at 999-1000 as follows:

> "Whenever the terms of a contract are susceptible of more than one interpretation, or an ambiguity arises, or the extent and object of the contract cannot be ascertained from the language employed, parol evidence may be introduced to show what was in the minds of the parties at the time of making the contract and to determine the object on which it was designed to operate. Testimony to explain ambiguous language in a contract may not be excluded on the ground that it is an effort to vary the terms of a written contract by parol testimony. The ambiguity may arise from words plain in themselves, but uncertain when applied to the subject matter of the contract, or from words which are uncertain in their literal sense."

It is also stated therein as follows:

> "Testimony to explain ambiguous language in a contract may not be excluded on the ground that it is an effort to vary the terms of a contract by parol testimony."

The same ruling is held in *Brown vs. Markland,* 16 Utah 360; *Great Western Printing Company vs. Belcher,* 104 S.W. 894.

From the rule laid down in these authorities, which unquestionably is the law, it was proper for the court to admit testimony of Duane E. Fuller, the Secretary-Treasurer of Self-Service Enterprises, Inc. and of Edwin F. Russell, the Respondent herein, to show what was in the minds of the parties at the time of the making of the lease, and to determine the object on which it was designed to operate. It will be recalled that Mr. Fuller testified that he carried on negotiations with the plaintiff in this action for a period of approximately two or three weeks prior to the final execution of the lease. (Tr. 6) In these negotiations Fuller tried to get Russell to grant an option for the renewal of the lease for a full ten year, or for a lesser term, but that the plaintiff refused to grant a renewal or extension of the lease for a period of longer than the initial ten year period. (Tr. 10-11)

In Fuller's interpretation of the wording of the paragraph concerning of the granting of a further period of time, he stated that he had rough-drafted other leases for the corporation; that if it were intended that there should be a definite renewal period stated in the lease for five or ten years, he would have written it into the

lease. (Tr. 10). He further stated that the only purpose for mentioning a renewal for a further period was to have some additional time after the termination of the ten year period to find another location within the same area, so that the Company might continue in business if it so desired. (Tr. 10-11).

The testimony of Fuller in relation to this matter is set forth in the transcript at pages 10 and 11, as follows:

> "A. And we talked to him (Russell). And I remember one thing; that we asked for a ten-year lease, which was permissible, and we asked about an option to renew and he (Russell) was against the renewal of it.
>
> "Now, here's the part that you've got to say that I do not remember. I can't remember the mechanics in bringing into it this wording, "for a further period". I can't remember that. But I'm under the impression — and this is an impression —
>
> "Q. If when you speak of impression, would that be your best recollection?
>
> "A. That would be my best recollection.
>
> "A. If we had had an option to renew, I would have put it in. If Mr. Russell had given us a specific number of years, I would have put it in. But my impression was, we tried to parley for time. What I mean, parley for time, would be we would come into a court such as this and ask the court to give us a year or two years, and then in the meantime we could build a station down the street. Now, that's the impression I had for that wording in there. I can't remember telling the attorney to put it in.

". . . Q. Now, had you asked Mr. Russell for an additional ten-year period of time?

"A. Yes, we asked him a couple or three times for a ten-year option.

"Q. What was his response?

"A. Well, he didn't want to give it.

"Q. Well did he say he didn't want to give it.

". . . A. Well, he objected. I remember he said, 'you can't — You don't know what will happen in ten years.' I remember something like that. I can't remember anything else."

It appears that C. N. Ottosen, the attorney for the original Lessee was never present during any of the negotiations, such negotiations being carried on by Duane E. Fuller, Secretary-Treasurer of the Company, and Helmut Moss, the President, with Russell. It is a fair conclusion, therefore, that whatever was put in the lease concerning a renewal thereof, was because of the rough-draft made by Fuller, or upon instructions from Fuller.

Edwin F. Russell, the Respondent in this action, in negotiating with Moss and Fuller, when the matter was discussed about the period of the lease, testified in the following words:

"It will be a ten-year lease or we cant' make a deal." (Tr. 25),

and further in the testimony he stated as follows:

"And finally we made the agreement on the ten-year lease. And we discussed about what might happen at the end of the ten-year lease. If I was willing — maybe I wouldn't be willing — maybe

I wouldn't want to re-lease. If I did, then we would write up a new lease for the period that we decided on." (Tr. 25)

Russell had nothing to do with the writing of the Lease (Tr. 26).

From this testimony it becomes evident that the original parties to this lease had no intention that a second period of ten years was contemplated by the Lessee as drawn.

The assignment of the original lease introduced as defendant's Exhibit 6, between the Self-Service Enterprises, Inc. as the Assignor to Wilburn C. West, as Assignee of the original lease, shows that the original parties understood that the lease was only for a ten year term. The wording of this assignment is as follows:

> "TO HAVE AND TO HOLD unto Wilburn C. West and his assigns from the 13th day of January, 1951, *for and during all the rest and remainder yet to come of and in the term of ten years mentioned in said lease. . .*" (italics are Respondent's)

It will be noted that thereafter the subsequent assignments did not have this qualification in them. The original Assignee and subsequent assignees, cannot obtain more under the assignments than that which was originally stated in the first assignment.

Almost without exception, the cases cited by the Appellant that parol evidence cannot be introduced to vary the terms of written instruments, are based on cases in which the trial courts found there was no ambiguity in the documents asked to be construed.

An example of this is the most recent case cited by the Appellant *Pulsipher vs. Tolboe,* 373 P.2d 360: (Utah decided April 2, 1962)

> ". . . Inasmuch as the language is clear and unambiguous, there is no basis for 'interpreting it' by showing what the intent or 'understanding' of the defendant was by extraneous evidence."

This quotation is admitted in Appellant's Brief at page 17.

In *Ephraim Theatre Company v. Hawk,* 7 Utah 2d 163, 321 P. 2d 221, cited by Appellant, the trial court also found that:

> "The parties here spelled out just how the proceeds from the operation of a theater should be applied . . . The understanding thus expressed is plain . . ."

In the case of *Jensen's Used Cars v. Rice,* 7 Utah 2d 276, 323 P. 2d 259 cited by the Appellant, the trial court found that the defendant had signed a conditional sales contract that contained clear, complete terms, including the price, and the defendant admitted all of this, so that there was no ambiguity.

In the case of *Mathias v. Madsen,* 1 Utah 2d 46, 261 P. 2d 952, the Court held that while the instrument was very poorly drawn, that the intent of the parties could be determined in what was expressed in the instrument.

In the case of *Continental Bank and Trust Company v. Bybee,* 6 Utah 2d 98, 306 P. 2d 773, the law pertaining to introduction of parol testimony is stated and is not in conflict with what the Respondent contends in this case. The question before the Court was whether the parties

intended by the Agreement that the Respondent should assume the obligation on a note held by the Continental Bank and Trust Company, and the Court held that the intent should be ascertained first from the four corners of the instrument itself, second from other contemporaneous writing concerning the same subject matter, and third from the extrinsic parol evidence of the intentions.

Wilson v. Gardner, 10 Utah 2d 89, 348 P.2d 931, there was a written contract entered into between the plaintiff and the defendant, whereby the plaintiff was to feed the defendant's cattle. Orally the parties made other agreements. The question in this case was whether the parties may orally modify an agreement in writing not within the Statute of Frauds. It appears to the Respondent that this case is not in point with the instant case.

In the case of *Oliver v. Nugen,* 308 P. 2d 132 (Kan.) it was held that an action upon a written contract tried in the lower court by both parties upon the theory that the contract is ambiguous, the appellants cannot change their theory on appeal and proceed on the premise that the written contract is free from ambiguity, and thereby preclude the admission of oral testimony to determine its meaning. The Court held that it is a judicial function to interpret a written contract which is free from ambiguity and does not require oral testimony to determine its meaning.

In the case of *Washington Fish and Oyster Company v. G. B. Halferty and Company,* 269 P. 2d 806, the action involved the interpretation of a contract for the outright sale of canned salmon. The court held that the rule is universal that the written contract itself must be re-

sorted to as the source of authority for receiving parol evidence. Respondent has no quarrel with this decision.

It is not often in a law suit that you have testimony concerning the construction of a contract in which both parties to the original agreement concur, at least in principle, as to its interpretation.

This evidence should carry great weight in arriving at a decision in this case. The Respondent contends the Appellant, as successor in interest of the original Lessee, is bound by the testimony and interpretation of such original Lessee which was his predecessor in interest.

CONCLUSION

Respondent, therefore, contends that the judgment of the trial Court should be affirmed.

Respectfully submitted,

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